LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JAN 26 1962
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1961

No. 454

BERNARD SILBER,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR PETITIONER

RABINOWITZ & BOUDIN,
25 Broad Street,
New York 4, N. Y.,

WECHSLER & DREYFUS,
504 Broadway,
Gary, Indiana,

Attorneys for Petitioner.

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
of Counsel.

INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 1

Constitutional Provisions, Statutes and Rules Involved 3

Statement 4

Summary of Argument 8

Argument:

I. The questions which petitioner refused to answer were not pertinent to the subject under inquiry by the Committee 11

II. In the circumstances shown here petitioner's interest in the protection of his First Amendment rights, and his right of conscience and the public interest in both outweighed the public interest in securing answers to the questions which were the subject of the indictment 15

A. The testimony which the petitioner was called upon to give was, at most, cumulative and the public interest in securing such information was trivial 18

B. The Court erred in excluding from the record the proffered testimony of Professor Emerson, offered on the issue of the balancing of public interest 20

III. There was no showing of probable cause sufficient to justify the issuance of a subpoena to petitioner 23

IV. Rule XI read in conjunction with 2 U. S. C. § 192 is too vague to support a criminal conviction 28

PAGE

V. The indictment should have been dismissed because of the presence of Government employees on the Grand Jury .....

VI. The Committee acted in violation of the First Amendment to the Constitution and in excess of its authority 31

Conclusion 32

Citations

CASES:

Barenblatt v. United States, 360 U. S. 109 ...9, 10, 11, 12, 15, 16, 17, 19, 20, 23, 25, 26, 29, 30, 31

Bates v. City of Little Rock, 361 U. S. 516 .....15, 17, 20

Bowers v. United States, 202 Fed. 2d 447 (C. A. D. C. 1953) 14

Braden v. United States, 365 U. S. 431 .....11, 15, 28, 29, 30, 31

Cervantes v. United States, 263 Fed. 2d (C. A. 9 1959) 26

Contee v. United States, 215 Fed. 2d 324 (C. A. D. C. 1954) 26

Deutch v. United States, 367 U. S. 456 ..... 13, 14

Gojack v. United States, Oct. Term, 1961, No. 128 30

Grand Opera Co. v. Twentieth Century Fox Film Corp., 235 F. 2d 303 (C. A. 7, 1956) 21

In re Bowling Green Milling Co., 132 F. 2d 279 (C. C. A. 6, 1942) 21

Koenigsberg v. California, 366 U. S. 36 15

Lanzetta v. New Jersey, 306 U. S. 456 28

Liveright v. United States, Oct. Term, 1961, No. 11 ..... 30, 31

Cases (Cont'd):

PAGE

Matter of an Attorney, 86 N. Y. 563 16

National Association for the Advancement of Colored People v. Alabama, 357 U. S. 449 ....17, 20, 23

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U. S. 292 21

Price v. United States, Oct. Term, 1961, No. 12 30

Raley v. Ohio, 360 U. S. 423 ..... 12, 28
Russell v. United States, Oct. Term, 1961, No. 8 .. 30, 31

Sacher v. United States, 356 U. S. 576 ..... 13, 28
Scull v. Virginia, 359 U. S. 344 .....12, 17, 23
Shelton v. Tucker, 364 U. S. 479 ..... 17, 23
Shelton v. United States, Oct. Term, 1961, No. 9 .. 25, 30
Sinclair v. United States, 279 U. S. 263 ..... 28, 30
Swezey v. New Hampshire, 354 U. S. 234 ..... 17, 19

United States v. Aluminum Co. of America, 148 F. 2d 416 (C. C. A. 2, 1945) 21
United States v. Castle, 138 Fed. Supp. 436 (D. C., D. C. 1955) 26
United States v. Orman, 207 Fed. 2d 148 (C. A. 3, 1953) 14

Watkins v. United States, 354 U. S. 178 ....4, 5, 12, 13, 14, 15, 17, 19, 26, 28, 31
Wilkinson v. United States, 365 U. S. 399 .....10, 11, 15, 24, 29, 30
Winters v. New York, 333 U. S. 507 28
Wrightson v. United States, 222 Fed. 2d 556 (C. A. D. C. 1955) 26

Constitution and Statutes

Constitution of United States:

First Amendment 2, 3, 5, 8, 9, 10, 15, 20, 31

Fourth Amendment 3

Fifth Amendment 3, 10

FEDERAL STATUTES:

PAGE

2 U. S. C. § 192 ..... 3, 10, 28, 30

Public Law 601, 79th Cong., Sec. 125 and House Resol. 5 of 85th Cong. 3

Rule XI of the Rules of the House of Representatives 3, 28, 29

Hearings

Hearings Before the Committee on Un-American Activities, 85th Cong., 1st Sess., pp. 1377-1529 24

Hearings Before the Sub-Committee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, 83rd Cong., 2nd Sess., Dec. 1953-March 1954 7

Hearings Before the Sub-Committee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, 82nd Cong., 1st Sess., May 14-June 14, 1951 7

Miscellaneous

Charles Black: Mr. Justice Black, The Supreme Court and The Bill of Rights, 222 Harper's Magazine 63 (Feb. 1961) 16

Coke, Third Institute, 194 (4th ed. 1669) 16

Kalven: Mr. Alexander Meiklejohn and the Barenblatt Opinion, 27 U. of C. L. Rev. 314 15

Kalven and Steffen: The Bar Admission Cases, 21 Law in Transition 155 15

Meiklejohn: Political Freedom (1960) 16

Supreme Court of the United States

OCTOBER TERM, 1961

No. 454

BERNARD SILBER,

Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR PETITIONER

Opinions Below

The District Court for the District of Columbia rendered no opinion. The opinion of the Court of Appeals is not officially reported, and is printed at R. 119.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1961. A petition for certiorari was granted on December 4, 1961. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

Petitioner was convicted of contempt under 2 U. S. C. 192 and was sentenced to four months imprisonment and

a fine of $100 for refusing to answer certain questions at a hearing of a Sub-Committee of the House Un-American Activities Committee (hereinafter referred to as the Committee). The questions presented are:

1. Were the questions which petitioner refused to answer pertinent to the subject under inquiry by the Committee and was that pertinency made clear to the witness?

2. Was there a probable cause sufficient to justify issuance of a subpoena to petitioner?

3. Did the public interest involved in securing answers to the questions here at issue outweigh petitioner's rights under the First Amendment and the public interest in preserving freedom of speech.

4. Did the District Court err in refusing to permit the introduction of testimony relating to the relative weight of the public and the private interests affected by the investigation of the Committee?

5. Was the statute under which petitioner was convicted unconstitutionally vague?

6. Was the investigation being carried on by the Committee pursuant to a bona fide legislative purpose?

7. Was the investigation carried on by the Committee permissible under the First Amendment to the Constitution?

8. Was the resolution establishing the Committee invalid for vagueness?

9. Was the inquiry conducted by the Committee within the scope of the resolution creating it?

10. Should the indictment have been dismissed because of the presence of government employees on the grand jury?

Constitutional Provisions, Statutes and Rules Involved

The constitutional provisions involved are the First, Fourth and Fifth Amendments to the Constitution of the United States.

The statutes involved are:

(1) 2 U. S. C. § 192, which reads as follows:

> "Refusal of witness to testify
>
> "Every person who having been summoned as a witness by the authority of either House or Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month or more than twelve months."

(2) Legislative Reorganization Act of 1946, Public Law 601, 79th Congress § 121 and House Resolution 5 of the 83th Congress, which reads in relevant part as follows:

> "(b) Rule XI of the Rules of the House of Representatives is amended to read as follows:
>
> "RULE XI
>
> "*Power and Duties of Committees*
>
> "(1) All proposed legislation, messages, petitions, memorials, and other matters related to the subjects listed under the standing committees named below shall be referred to such committees, respectively * * *.

"(q) (1) Committee on Un-American Activities.

"(A) Un-American Activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversion and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Statement

Petitioner was subpoenaed to appear before the House Un-American Activities Committee by subpoena issued June 21, 1957, five days after the decision of this Court in *Watkins* v. *United States*, 354 U. S. 178 (R. 14). He appeared before the Committee on August 2, 1957 (R. 15). He testified, under questioning by Committee counsel, that he was at that time employed by Western Union Telegraph Company, and that he had been so employed for 41 years. In the course of his work he had access to "Government coded messages," but he had no way of telling whether they were security messages or not (R. 24, 25). He said that he had been a member of the Communist Party "for a brief period" in about 1948 but was no longer a member (R. 26). He drifted away almost immediately and was never active (R. 26). He attended meetings infrequently (R. 33, 34).

He was then asked what group of the Communist Party he was a member of. He refused to answer on grounds of lack of jurisdiction of the Committee, his rights under the

First Amendment, the vagueness of the resolution setting up the Committee and lack of pertinency. He relied heavily on the decision of this Court in the *Watkins* case (R. 26; 67-71).

The following colloquy immediately ensued:

> "Mr. Scherer: You refused to answer Mr. Arens' question as to the person who recruited you in the Communist Party. You refused to identify that person.
>
> Now, without identifying him or telling us his name, is that person still a member of the Communist Party today?
>
> (The witness confers with his counsel.)
>
> Mr. Silber: I have no knowledge of such—
>
> Mr. Scherer: Is he still associated in the same type of work you are associated in?
>
> (The witness confers with his counsel.)
>
> Mr. Scherer: As a communications worker?
>
> Mr. Silber: To the best of my knowledge he is no longer in the industry.
>
> Mr. Scherer: Was he a communications worker?"

This last question forms the basis of Count 1.

After the witness' refusal to answer on the grounds previously given, counsel for the Committee stated that the Committee was considering legislation to safeguard the nation from possible espionage or sabotage of communications facilities and that if the person who enlisted petitioner into the Communist Party was in the Communications field, "that person undoubtedly would have some information of use to the Committee in developing facts respecting Communist penetration of the communications facilities of this country" (R. 28).

After some further colloquy, the witness persisted in his refusal for the reasons stated above, and added:

> "Mr. Silber: Including the matter of personal conscience which prevents me from doing things that

I am not sure of, and also on the grounds that I don't see what this question has to do with the question [of] propaganda which this committee is concerned with." (R. 30)

Subsequently in the hearing the following occurred:

"Mr. Scherer: What union do you belong to?
Mr. Silber: The American Communications Association.
Mr. Scherer: Were any of the officers of your union members of the Communist Party at the time you were a member of the Communist Party?
Mr. Silber: I must decline to answer that, sir.
Mr. Scherer: I ask that you direct the witness to answer the question.
Mr. Doyle: I direct you to answer the question.
Mr. Silber: I must decline on all the grounds previously stated.
Mr. Scherer: Were any of the present officers of your union members of the Communist Party at the time you were in the party?
Mr. Silber: I must decline for the same reasons. I must decline to answer.
Mr. Scherer: I ask that you direct the witness to answer the question.
Mr. Doyle: I direct you to answer the question.
Mr. Silber: I must decline to answer.
Mr. Scherer: And those questions were asked you for the same reasons that Mr. Arens, our counsel, gave you for asking the other questions. They are pertinent for the same reasons that he advanced." (R. 34).

These two questions constitute Counts 3 and 4.

The witness was not asked any questions concerning his own activities in the Communist Party. When he was excused, the Chairman of the Subcommittee congratulated the witness "for getting out of the Communist group when you did." He urged the witness to help the Committee, but the witness responded:

"I have given you the best answer that I could under the circumstances. I have a conscience to protect, and other things. I am sorry." (R. 35)

The House of Representatives subsequently cited petitioner for contempt. He was indicted on or about August 4, 1958, by a grand jury in this District. He moved to dismiss the indictment and for a hearing on the qualifications of the grand jurors, filing an offer of proof in connection with the latter motion (R. 3-9). The motions were denied, except that Count 2 was dismissed (R. 10).

At the trial, the only witness for the prosecution was counsel for the Committee, Mr. Arens. After stating that the Committee had decided to proceed with the investigation, he testified that it caused a subpoena to be issued to petitioner stating that the Committee had information "that Mr. Silber had been a member of the Communist Party engaged in the communications field" (R. 15).

On cross-examination Mr. Arens testified that he had previously been special counsel to the Internal Security Subcommittee of the Senate Committee on the Judiciary and that in 1951 he had conducted an investigation into communism in the communications industry, particularly into the American Communications Association, the union of which petitioner was a member and which was the subject of Counts 3 and 4 of the indictment. The witness recalled a "synopsis of some kind" resulting from that investigation (R. 38).[1] Again in 1954 he conducted a hearing into the communications industry.[2]

Mr. Arens further testified that the information he received from the Committee files and from Committee

---

[1] In fact a "Progress Report" was issued by the Senate Committee in 1951 and a "Supplemental Report" in 1952. (See Hearings before the Subcommittee to Investigate the Administration of the Internal Security Act of the Senate Committee on the Judiciary, 82nd Cong., 1st Sess., May 14-June 14, 1951, at p. v, and Supplemental Hearings, 82nd Cong. 2nd Sess., Jan. 22, 1952, at p. v.)

[2] See hearings before the same Subcommittee Dec. 1953-March, 1954, 83rd Cong. 2nd Sess., entitled "Subversive Influence in Certain Labor Organizations."

investigators was sufficient in his mind to justify the issuance of a subpoena to the petitioner. This testimony will be considered in more detail in connection with the discussion of Point II, *infra*.

After the Government rested, an offer of proof was made by the petitioner relating to his contention that his individual and the public interest in protecting his rights of free speech and assembly and his right of privacy overbalanced the public interest in securing answers to the questions put to him (R. 94-96; 97-118). The offer was rejected, and petitioner rested (R. 96). After trial the Court denied a motion for direction of acquittal and found petitioner guilty on all three counts (R. 96). He was sentenced to imprisonment for a term of four months and to pay a fine of $100, the sentence being "on the indictment rather than on the individual counts" (R. 97). He was continued at large on bond of $1,000.

The Court of Appeals affirmed on June 30, 1961 (R. 119).

Summary of Argument

I

Petitioner admitted casual membership in the Communist Party 9 years prior to his interrogation; he answered all questions pertaining to himself and his own activity but declined to answer certain questions on the ground that it would require the naming of other persons. His objection was based, *inter alia*, on First Amendment grounds, lack of pertinency and the fact that his conscience would not permit him to name others. On the record here, it is clear that the purpose of the Committee was not to secure information for legislative purposes, since it addressed no such questions to the petitioner, but, rather, to secure the names of other persons, and thus to expose their political affiliation.

Furthermore, the remoteness in point of time of petitioner's membership in the Party and his knowledge of party activities destroyed whatever pertinency the questions might otherwise have had.

II

In *Barenblatt* v. *United States*, 360 U. S. 109, this Court held that "where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." The instant case presents questions involving the application of the "balancing" doctrine in two respects: First, the testimony which the Committee sought to elicit from the petitioner was partly cumulative and partly merely corroborative of sworn testimony already in the possession of the Committee; furthermore, it would have compelled petitioner to become an informer, in violation of his reasonable conscientious scruples. Hence, the public interest in securing such trivial information could not outweigh the substantial public and private interests protected by the First Amendment. Second, the District Court erred in refusing to accept expert testimony offered to establish that the basic premise upon which the Committee seeks to justify its interrogation, namely, that there is a danger to internal security which justifies interference with First Amendment rights, is not supported in fact. Under the circumstances shown by this record, the issues should be resolved by a determination that the First Amendment rights asserted by the petitioner are sufficient to bar governmental interrogation.

III

The alleged ground for issuance of a subpoena to petitioner consisted, first, of the fact that he had at some undetermined year in the past signed a Communist Party nomi-

nating petition and, second, that an unidentified and unknown informer had named him as a Communist. This does not constitute "probable cause" for the issuance of a subpoena within the meaning of *Barenblatt* v. *United States*, *supra*, and *Wilkinson* v. *United States*, 365 U. S. 399. Lawful participation in an election campaign, together with gossip and rumor, without more, do not justify subpoenaing a witness before a Congressional committee.

IV

Rule XI of the Rules of the House, read in conjunction with 2 U. S. C. § 192, is too vague to support a criminal conviction. The meaning attributed to it by this Court in the *Barenblatt* case can be derived from the language of the rule only through extensive investigation into legislative history. Such an investigation is not justified in a criminal prosecution. The Fifth Amendment requires that a criminal statute, to support a conviction, must be clear on its face.

V

Fifteen members of the Grand Jury were Government employees and, under the circumstances, petitioner should have been offered the right to conduct an inquiry into their possible bias in a case of this nature. The Court below erred in denying the motion for such inquiry.

VI

The powers exercised by the Committee are outside its jurisdiction and in violation of the First Amendment to the Constitution.

This point is not briefed herein since it appears to be in conflict with the decisions of this Court in the *Barenblatt*

and *Wilkinson* cases, and *Braden* v. *United States*, 365 U. S. 431, but petitioner does not wish to be understood to have acquiesced in those decisions without, at least, this note of protest.

POINT I

The questions which petitioner refused to answer were not pertinent to the subject under inquiry by the Committee.

This case presents directly for decision the question which this Court declined to consider in *Barenblatt* v. *United States*, 360 U. S. 109 namely, whether a witness may be held for contempt for refusal to answer questions relating to the names of other persons who are associated with him in political activity under investigation by the Committee. This Court will recall that Count 3 in *Barenblatt* related to the following question:

> "Now you have stated that you knew Francis Crowley. Did you know Francis Crowley as a member of the Communist Party?"

This Court stated, at page 115:

> "As we conceive the ultimate issue in this case to be whether petitioner could properly be convicted of contempt for refusing to answer questions relating to his participation in or knowledge of alleged Communist Party activities at educational institutions in this country, we find it unnecessary to consider the validity of his conviction under the Third and Fifth counts, the only ones involving questions which on their face do not directly relate to such participation and knowledge."

The three questions at issue here likewise do not relate to petitioner's participation in or knowledge of alleged Communist Party activities, but rather to the identity of

other persons in the Party. This Court in specifically omitting consideration of this question in *Barenblatt*, in effect reserved decision on that issue for subsequent cases. The issue is now squarely presented in this case.

The Government argued in its opposition to the petition for certiorari that the questions which are the subject of the indictment had relevance independent of their value in disclosing the names of party members. This may or may not be true but it is clear from *Watkins* and *Scull* v. *Virginia*, 359 U. S. 344 that the pertinence of questions must be explained to the witness, especially when, as here, he objected on grounds of lack of pertinence (R. 71, 29, 31). To argue now, as an afterthought, that the answers to the questions would "probably provide information of considerable value to the Committee" (Brief for the United States in opposition to petition for certiorari, p. 12) is a belated and impermissible effort to justify a relevancy argument that was never made to the witness and, hence, cannot be made now. To permit such a change in theory would not only fail to meet the test of clarity required by *Watkins*, but would constitute the "active misleading" condemned in *Raley* v. *Ohio*, 360 U. S. 423.

The explanation of pertinency to the witness is clear beyond any shadow of doubt. Mr. Arens explained the pertinency of the first question as follows:

> "If the person who enlisted you into the Communist Party was engaged in the communications field, that person undoubtedly would have some information which would be of use to this Committee in developing facts respecting Communist penetration of the communications facilities of this country" (R. 28).

In explaining the pertinency of the question in Count 2 (dismissed before trial) Committee counsel had the following to say:

> "If you do have such information [as to whether there are persons engaged at Western Union who at any time were known to appellant as Communists] and if we can get the names of those people and if we can get them to testify, we, will have information which will form a solid foundation upon which this committee can recommend legislation to the Congress, to protect the security of this Nation" (R. 31).

In explaining the pertinence of the questions contained in Counts 3 and 4, Congressman Scherer said:

> "And those questions were asked you for the same reasons that Mr. Arens, our counsel, gave you for asking the other questions. They are pertinent for the same reasons he advanced" (R. 34).

The witness was, so far as the record appears, willing to answer all questions concerning his own activities in the Communist Party. True, the Committee which is always more interested in names than in substance, showed a lack of interest in such activities and asked no questions concerning them. But the witness' refusal related only to the activities of other persons.

In effect, therefore, the questions put to petitioner really constituted a discovery proceeding. The Committee was using him, not to get evidence concerning his own activities in the Communist Party but to get the names of other persons so that they in turn could be questioned. We do not understand that the Committee has any such authority, or that such inquiry constitutes a proper legislative purpose.

This Court has made it clear enough that in this area, in which a close balance exists between the individual and public rights involved, the issue of pertinency should be scrutinized with great care. *Sacher* v. *United States*, 356 U. S. 576; *Deutch* v. *United States*, 367 U. S. 456; *Watkins*

v. *United States, supra.* And see *United States* v. *Orman,* 207 Fed. 2d 148 (C. A. 3, 1953). The questions here under consideration cannot bear such scrutiny.

Furthermore, it must be noted that petitioner had not been a member of the Communist Party for about nine years prior to his testimony. The Committee was indeed reaching far back to secure information which might have served Congress in 1957 when the witness testified. Testimony as remote as any the petitioner was requisitioned to give likewise fails to meet the test of pertinency. *Bowers* v. *United States,* 202 Fed. 2d 447 (C. A. D. C., 1953); *Deutch* v. *United States, supra.*

Finally, a consideration of the testimony relating to the specific counts on which petitioner was convicted would call for a reversal. Indeed, the first count involves a question which seems to have been answered immediately prior to the refusal to answer. It will be noted (R. 27, 28) that Mr. Scherer asked, "Is that person still a member of the Communist Party today * * * as a communications worker?" The petitioner answered, "To the best of my knowledge he is no longer in the industry." He was then asked, "Was he a communications worker?" It would seem that the response immediately preceding the question which forms the basis of Count 1 had been sufficiently answered by the witness by the response that "he is no longer in the industry."

The record with respect to Counts 3 and 4 is likewise insufficient in that no explanation of pertinency was made until after the witness had been directed to answer the questions and he had refused to do so. The witness was never given an opportunity to make answer after pertinency had been pointed out to him. Clearly, his refusals when made were proper and he cannot be held for contempt in the absence of a clear statement of pertinency *before* the direction of an answer.

POINT II

In the circumstances shown here petitioner's interest in the protection of his First Amendment rights, and his right of conscience and the public interest in both outweighed the public interest in securing answers to the questions which were the subject of the indictment.

We think this Court made a serious error when it said in *Barenblatt* v. *United States*, *supra*, at 126:

> "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown."

We suggest that this was a mistake for two reasons. Fundamentally it reduces the force and significance of those basic rights protected by the First Amendment which are essential to the preservation of our democracy (see dissenting opinions in *Barenblatt* v. *United States*, *supra*, at page 134; *Wilkinson* v. *United States*, 365 U. S. 399, 415; and *Braden* v. *United States*, 365 U. S. 431, 438). In addition, the Court has set up a standard of criminal liability which is difficult, if not impossible, to apply and which adds immeasurably to the vagueness which is inherent in the resolution which defines the Committee's jurisdiction. See *Watkins* v. *United States*, *supra*, at 202.

However, this Court has made its decision, and is therefore confronted with the task of defining and exploring the "balancing concept" which has been the subject of so much discussion in the past few years. See dissenting opinions cited above; also *Koenigsberg* v. *California*, 366 U. S. 36, 56; *Bates* v. *City of Little Rock*, 361 U. S. 516 and many other cases. Also, Kalven: *Mr. Alexander Meiklejohn and the Barenblatt Opinion*, 27 Univ. of Chicago, L.

Rev. 314; Kalven and Steffen: *The Bar Admission Cases*, 21 Law in Transition 155, 173; Charles Black: *Mr. Justice Black, The Supreme Court and the Bill of Rights*, 222 Harpers Magazine 63 (February, 1961); Meiklejohn: *Political Freedom* (1960). This is a very difficult task but must be undertaken unless the process of balancing is to become a cover-up for arbitrary and *ad hoc* decisions which would be intolerable in any case but even more so in a criminal prosecution.

The questions raised by the *Barenblatt* formula are many and most of the answers await illumination by this Court. We are required to balance competing rights and interests. The private right involved in this case is quite clear. It is the right to refuse to be an informer—the right to retain his self-respect and self-esteem. As the New York Court of Appeals has said: "Informers have always been a despicable race" (*In the Matter of—*, an attorney, 86 N. Y. 563, 570). And petitioner sought to avoid that deep stigma, which is universally attached to such "viperous vermin" (Coke, *Third Institute*, 194, 4th ed. 1669).

The public interests are not so easy to define, but they would seem to fall, some on one side and some on the other side of the scale.

On the one side, in favor of the broad right of governmental interrogation, is the vital interest to protect public order against subversion and illegal or violent overthrow; on the other is the public interest in keeping open channels of free discussion so that our democracy may live.

Having once determined on the scope of private rights and public interests to be weighed in this balance, the next question is who performs this weighing operation and how. Clearly the balance must be struck by the Court rather than the legislature because otherwise the determination of the legislature to invade private rights would be deci-

sive, and we know that this cannot be true. *Bates* v. *City of Little Rock, supra; National Association For The Advancement of Colored People* v. *Alabama*, 357 U. S. 449; *Scull* v. *Virginia*, 359 U. S. 344; *Shelton* v. *Tucker*, 364 U. S. 479.

But this leaves open two critical issues: (1) how does the Court get the information which would enable it to balance private rights and public interests, and (2) what did this Court mean when it directed that the balance was to be related to "the particular circumstance shown." Did the Court mean that in the circumstances in which we now find ourselves, in this decade of the Twentieth Century in the United States, free speech rights and the right to remain silent, asserted by alleged Communists *never* outbalance the Government's right to interrogate (as compared, for example, to the constitutional rights asserted by Negroes which evidently always outweigh governmental interrogation by southern states)? Or did this Court mean that the Trial Court would hear evidence on the circumstances shown in each case and would, on that evidence, decide the way the balance must fall?

This case was tried shortly after the decision in *Barenblatt* had made it clear that the rights which we thought were protected by *Watkins* and *Sweezy* v. *New Hampshire*, 354 U. S. 234 were in fact not protected at all. So petitioner and counsel addressed themselves to the problem of balancing in accordance with the opinion of the Court in *Barenblatt*. We argued below, and argue here, that in our system of laws, guilt is individual and each defendant is entitled to be tried on the record made in his own individual case. It follows that the Trial Court must, in each case, weigh the evidence separately. Among the elements to be considered in determining guilt is the balance that this Court has ordered to be struck between the various rights and interests at stake and so we offered evidence, first, that in view of the information already in

the possession of Congress, the interest of Congress in getting the additional information it sought from petitioner was trivial and could not outweigh the public interest and private rights on the other side of the scale, and, second, that the general political situation was such that the information sought by the Committee was not substantial.

The Court below disposed of this argument with the remark that "this 'balancing' is strictly a matter of law for decision by the Court and, therefore, 'expert' testimony is irrelevant" (R. 123).

We respectfully suggest that this holding is an evasion of the issue. The question remains, how does the Court decide? Does each Judge make this decision on the basis of his personal political views as to the relative importance of things in this changing world so that the standard is as variable as the Chancellor's foot, or does the Court act in what we have all understood to be a judicial manner, namely, upon the consideration of objective facts presented to it on the basis of a record made in open court with full opportunity on the part of all parties to present these facts and have them determined by the tribunal?

A

The testimony which the petitioner was called upon to give was, at most, cumulative and the public interest in securing such information was trivial.

This is not the first time there has been a Congressional investigation of "Communist infiltration" in the telegraph industry. As Committee counsel testified, similar investigations have been carried out over a period of years (R. 38, 39; see footnotes 1 and 2, p. 7, *supra*). These prior hearings were not casual or preliminary to the hearing at which petitioner testified, but occupied several hundred pages of testimony and involved the naming of over 100 alleged Communists in the industry. At the several hear-

ings mentioned above, many names were repeated over and over again by the various witnesses called.

Petitioner's membership in the Party had been remote in time and casual in substance. At the most, if he had answered, he might have added to the hundred or more names already in the possession of Congress, the names of two or three more persons who might or might not have been called by the Committee to add a few words to the thousands of words already in the record. There is nothing to suggest that this witness could have named anyone who could have come forward to add anything of significance to the vast bulk of material already submitted to the Congress on this and other occasions. Any testimony he might have added would have been entirely cumulative and of such trivial nature that it is difficult to understand how it can be said to outweigh any private interest at all. As the record of those hearings shows, there have been many witnesses in the industry who have come forth voluntarily to give testimony to the Committee and certainly Congress had all of the information it could conceivably need to consider any legislation on this subject.

Against this we must weigh the very substantial rights of the petitioner. In addition to the constitutional rights which this Court agreed were of utmost importance in *Watkins*, *Sweezy* and *Barenblatt*, there is here an additional right, namely, the right to remain silent and to refuse to be an informer.

The role of an informer, throughout the history of the human race, has been a despicable one. Twice in the course of his testimony the witness referred to his conscientious scruples, in addition to the extensive legal arguments proposed by him (R. 30, 35). If there ever was a case in which substantial and important private rights might be said to outbalance the public interest in securing trivial and useless information, this record presents that case.

B

The Court erred in excluding from the record the proffered testimony of Professor Emerson, offered on the issue of the balancing of public interest.

If the Court, in its enigmatic language in *Barenblatt* meant to refer, not to the specific circumstances surrounding a particular hearing, but rather to a general political situation which is presumed to exist, we must, difficult though it may be, address ourselves to this general political situation.

It should be noted first, that this Court does in fact balance interests separately in each case. Thus in *NAACP* v. *Alabama*, 357 U. S. 449, and *Bates* v. *City of Little Rock*, 361 U. S. 516, the Court did consider the facts separately. And, after balancing them, it came to the conclusion that the rights of the individuals involved outweighed the right of the state in securing information which impinged on First and Fourteenth Amendment rights. The same procedure should have been followed here but it was not.

In the *Barenblatt* case, the Court (at p. 128 *et seq.*) made certain "findings" with respect to the alleged threat of Communism to the United States. We assume that those findings were made on the basis of the record in that case, together with additional facts of which the Court took judicial notice.

In the instant case there are no facts in the record for the basis on which any finding could be made that Communism constitutes a sufficient threat to the communications industry in the United States or to our internal security to justify interference with First Amendment rights which, it must be generally conceded, exist here. So we must assume that the District Court took judicial notice of the facts it was required to find under the *Barenblatt* decision, namely, that in balancing the competing rights and public interests at stake in these circumstances, governmental interrogation was permitted.

Generally speaking, a court may take judicial notice of facts which are "common knowledge" but the doctrine of judicial notice can never constitutionally be utilized to bar evidence seeking to contradict such "common knowledge". Testimony is always admissible on any factual issue before the Court. As the Supreme Court said in *Ohio Bell Telephone Co.* v. *The Public Utilities Commission of Ohio*, 301 U. S. 292, 301:

> "Moreover, notice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence, Wigmore, Evidence § 2567; 1 Greenleaf, Evidence, 16 Ed., p. 15. 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.' *Ibid.*"

In *Grand Opera Co.* v. *Twentieth Century Fox Film Corp.*, 235 F. 2d, 303, 307 (C. A. 7, 1956), the Court said:

> "Judicial notice is merely a conventional method of taking evidence to establish facts."

To the same effect, see *In Re Bowling Green Milling Co.*, 132 F. 2d, 373 (C. C. A. 6, 1942); *United States* v. *Aluminum Co. of America*, 148 F. 2d, 416 (C. C. A. 2, 1945).

In order to establish his contention, that in the circumstances shown in this case private and public interests in protecting freedom of speech outweighed the public interest in permitting interrogation, petitioner offered expert testimony on the subject, it being difficult to conceive of any alternative way in which proof addressed to this issue could be presented in a court. Hence, expert testimony of Professor Thomas I. Emerson, Professor of Law at Yale University was prepared in writing and was submitted to the Court at the trial for a ruling as to admissibility. The Court refused to accept the testimony, but the offer of proof is a part of the record and appears at R. 97-118. This testimony may be summarized as follows:

The witness first qualified himself as an expert, setting forth his professional background since his graduation from Law School in 1931. After extensive and widespread experience in government service he became a member of the faculty at Yale Law School in September, 1946. Since that time his major field of research has been public law and within that general area, political and civil rights. He has written a two volume work on the subject, a second edition of which was published in 1958, and since 1946 he has maintained an extensive file of material on this subject. In the academic year 1953-1954 he studied civil liberties in Great Britain; for the academic year 1960-1961 he received a Fellowship from the Ford Foundation to study the legal foundations of the right of political expression. He is in close touch with other academic communities through contacts with faculty members, students and other organizations within various educational institutions. He is fully familiar with the work of the House Committee on Un-American Activities (R. 97-101).

Professor Emerson then outlined in considerable detail legislation already in existence relating to the protection of internal security in the United States. He discussed the social conditions which might give rise to political and social unrest, and the strength of the Communist Party, the organization against which this Committee has directed most of its activities. He pointed out that in political activity, in industry, agriculture, labor, religion, education and in other areas of American life the Communist Party has substantially no influence (R. 102-113).

Professor Emerson then turned "to the other side of the scales" and considered the interest of the individual and of society in freedom of speech. He discussed the interests of the individual in his right of expression and in his right of silence and the nature of the interest of society in freedom of political expression in a democratic

society. Such a right of expression is, he pointed out, necessary to a healthy functioning of society. He considered in some detail the economic and social effects upon the witness called before the Committee as well as the effect on his right of association (R. 113-117).

In conclusion Professor Emerson stated as his opinion

> "that the interests of the Government in obtaining answers to the questions put to this defendant as an aid in developing further legislation to protect internal security are substantially outweighed by the interests of the individual in freedom of speech or silence, as he may prefer, and by the interests of the community in maintaining freedom of political expression and other conditions essential to maintaining an open society" (R. 117-118).

We shall not here consider the merits of Professor Emerson's testimony or its weight but only its admissibility. It seems clear that if the balancing concept established by the Court in the *Barenblatt, NAACP, Scull and Shelton* cases, *supra*, is to be applied in a way that will protect the constitutional liberties of petitioner and others similarly situated, testimony on the subject must be admissable. Otherwise, there is no way in which the Court can balance those interests save by its own speculation.

POINT III

There was no showing of probable cause sufficient to justify the issuance of a subpoena to petitioner.

The Supreme Court in *Barenblatt* said, at page 134:

> "Nor did petitioner's appearance as a witness follow from indiscriminate dragnet procedures, lacking in probable cause for belief that he possessed information which might be helpful to the Subcommittee."

**

The Court, in a footnote, referred to page 124 and to note 24 of the opinion. The references are to sworn testimony given before the Committee identifying Barenblatt as a member of the Communist Party, and to evidence in its files to the same effect. Similar language, and a similar footnote appear in *Wilkinson* v. *United States*, 365 U. S. 399, 412, footnote 9.

Eleven witnesses appeared before the Committee in July and August, 1957 at the hearings at which petitioner testified, and named about sixty persons as having been members of the Communist Party.[3] In the 1951, 1952 and 1954 hearings before the Senate Committee (conducted by Mr. Arens, presently counsel to the House Committee) about a hundred more had been named as members of the Communist Party by witnesses appearing before those Committees.[4] No one had ever named petitioner either as a member of the Communist Party or in any other respect. At the trial, the prosecution presented testimony, through its only witness, Mr. Arens, that the Committee had information in its files as to the Communist Party membership of petitioner, but he did not state the nature of that information. On cross-examination it appeared that the evidence in the Committee's files consisted of:

(1) A photostat of the New York Times dated January 15, 1940, over 17 years prior to the issuance of the subpoena to the witness, which stated that, in a factional dispute within the American Labor Party in New York, 99 persons of whom petitioner was one, had been named as "Reds" by the opposing political group because they

[3] Hearings before the Committee on Un-American Activities, 85th Congress, 1st Session, pp. 1377-1529.

[4] See hearings cited at footnote 2, p. 7, *supra*.

had signed Communist Party nominating petitions (Deft.'s Ex. 3), and

(2) A report in the Committee file, reading as follows:

"CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES

Committee on Un-American Activities
Washington, D. C.
MEMO

June 12, 1957

To: Mr. Richard Arens, Director

FROM: Louis J. Russell
Investigator

SUBJECT: Bernard Silber

This individual is employed as a service writer by Western Union and as such would have access to messages and facilities of the Western Union which would present sabotage and espionage possibilities.

As a service writer, his position would be considered important.

He signed Communist Party petitions on behalf of Israel Amter and Benjamin Davis.

His son, whose first name is unknown, was also identified as a member of the Communist Party by a confidential source.

LJF:v" (Deft.'s Ex. 4)

It is submitted that this information does not establish probable cause to justify the calling of petitioner as a witness, and that the subpoena issued to him resulted from exactly the kind of "indiscriminate dragnet procedures" which the Court condemned in *Barenblatt*.

The issue of probable cause in the issuance of a subpoena to a witness was treated exhaustively by the brief submitted in behalf of the petitioner in *Shelton v. United States*, No. 9, at this Term of the Court, and we respectfully refer the Court to the excellent historical discussion contained in

that brief, and particularly at page 29 *et seq.* thereof. We shall not burden the Court with a repetition of that argument but shall add merely a few comments.

The term "probable cause" is no stranger to the law, and its meaning has often been defined. In *Contee* v. *United States,* 215 Fed. 2d 324, 327 (C. A., D. C. 1954), the Court said:

> "An uncorroborated tip of an informer, whose identity and reliability are both unknown, does not constitute probable cause to make an arrest."

In *Cervantes* v. *United States,* 263 Fed. 2d 800, at 803, (C. A. 9, 1959), the Court noted:

> "* * * probable cause means more than a bare suspicion."

And in *United States* v. *Castle,* 138 Fed. Supp. 436 (D. C., D. C. 1955), Judge Youngdahl, in ruling evidence inadmissible said:

> "An arrest or warrant for an arrest may not be based upon the suspicion or opinion of some person, unsupported by personal knowledge of the facts, and a warrant to search a private home may not rest upon a mere statement of suspicion without the disclosure of supporting facts and circumstances to justify the suspicion."

It is also clear that the burden of establishing probable cause is on the Government. *Wrightson* v. *United States,* 222 Fed. 2d 556 (C. A., D. C. 1955); *Cervantes* v. *United States, supra.*

If, as this Court has held, probable cause is necessary for the issuance of a subpoena, it is clear that no probable cause existed here. We do not have, as in *Barenblatt* (and in *Watkins* and in most of the other cases which have come before this Court), sworn testimony identifying petitioner as having been a member of the Communist Party. Instead, we have a tip from undisclosed "confidential sources," who,

so far as we know, were not even known to the Committee. Added to this is the fact that petitioner along with thousands of others, is alleged to have signed a Communist Party nomination petition.[1]

Petitioner, in signing a Communist Party nominating petition (if he did sign) was exercising a constitutional right to participate in the electoral process and a right given under the laws of the State of New York to petition to have a member of the Community Party on the ballot for election to public office.

Evidently petitioner was subpoenaed because over a decade ago he signed one or two Communist Party nominating petitions and, so far as this record shows, for no other reason. If this does not constitute an abuse of the subpoena process such as that referred to by the Court, we find it difficult to conceive of a case in which such abuse could exist.

---

[1] The charge that petitioner was one of 99 "Reds" in the American Labor Party (New York Times, Deft's Ex. 3) was apparently based on the fact that petitioner had signed a Communist Party nominating petition. There is no evidence in the record as to when these petitions were signed. The most recent date on which petitioner could have signed a Communist nominating petition was 1946, when Davis ran for Attorney General of New York State on the Communist Party ticket. A nominating petition for that office would require 12,000 signatures. Amter had run for governor in 1942 and for member of the City Council in 1937 and 1939.

POINT IV

Rule XI read in conjunction with 2 U. S. C. § 192 is too vague to support a criminal conviction.

House Rule XI treated in conjunction with 2 U. S. C. 192 must be treated as a criminal statute. *Sacher* v. *United States*, 356 U. S. 576, 577; *Watkins* v. *United Statese, supra*, at 208. Therefore, to be valid, Rule XI must establish a standard of conduct that meets the test of *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Winters* v. *New York*, 333 U. S. 507, and *Raley* v. *Ohio*, 360 U. S. 423. Quite aside from petitioner's right to rely on the decision in *Watkins* which was argued before this Court on behalf of the petitioner in *Braden* v. *United States, supra*, and disposed of by reference to *Sinclair* v. *United States*, 279 U. S. 263, we raise here a due process question going to the uncertainty of the meaning of the criminal statute under which petitioner was convicted. If a criminal statute is uncertain, it cannot support an indictment. This Court said in the *Raley* case, *supra*, at page 438:

> "• • • A State may not issue commands to its citizens, under criminal sanctions, in language so vague and undefined as to afford no fair warning of what conduct might transgress them. *Lanzetta* v. *New Jersey*, 306 U. S. 451. Inexplicably contradictory commands in statutes ordaining criminal penalties have, in the same fashion, judicially been denied the force of criminal sanctions. *United States* v. *Cardiff*, 344 U. S. 174. Here there were more than commands simply vague or even contradictory. There was active misleading. Cf. *Johnson* v. *United States*, 318 U. S. 189, 197. The State Supreme Court dismissed the statements of the Commission as legally erroneous, but the fact remains that at the inquiry they were the voice of the State most presently speaking to the appellants. We cannot hold that the Due Process Clause permits convictions to be obtained under such circumstances" (360 U. S. 423, 438-9).

It is true that the majority in the *Barenblatt* case was able to assign a meaning to the vague language contained in Rule XI. This it did after a study of the twenty year history of the Committee in the course of which reference was made to debates on the original authorizing resolution in the 75th Congress, to seventeen House Reports from the 76th Congress to the 85th and to twenty-three House Resolutions extending over the same period of time. It may be that such an historical survey justifies the conclusion to which the Court came as to the intent of Congress. The difficulty is that we are not here concerned with the intent of Congress, but rather with the guilt or innocence of petitioner who is entitled to read a statute and to base his conduct on a fair interpretation of the words set forth therein.

It is unreasonable to expect that petitioner would understand that the word "un-American" really meant "Communist Party", especially a few months after the Chief Justice of the United States, in an opinion joined in by a majority of this Court, had been unable to define the words. It is unreasonable to expect that petitioner would interpret the words "propaganda activities" as meaning "any activity". Indeed the witness himself indicated his understanding that the statute referred only to propaganda activity (R. 30).

We know of no case prior to *Barenblatt* in which a Court was compelled to rely on legislative history in order to uphold a criminal conviction and we respectfully suggest that to the extent to which the Court was compelled to rely on such history in the *Barenblatt*, *Braden* and *Wilkinson* cases it did so in clear violation of the most fundamental rights guaranteed under the due process clause. If a statute is clear on its face (and no one can reasonably contend that this statute is clear), there is no occasion to resort to legislative history; if a state is unclear on its face it cannot support a criminal conviction.

We are aware of the fact that the contention we are here making was inherent in the record in *Barenblatt*, *Braden* and *Wilkinson* and it seems to have been argued in the *Braden* case. However, it was not considered in any of the three opinions.

Assuming that the Committee had the jurisdiction it claims (as the Court found in *Barenblatt*) and assuming further that the intent of the defendant in a § 192 case is not relevant, as the Court held in *Sinclair* and *Braden*, the constitutional objection remains that the statute is unclear and that the tests set forth by this Court in the earlier cases, cited above, cannot be met.

POINT V

The indictment should have been dismissed because of the presence of Government employees on the Grand Jury.

Fifteen members of the Grand Jury which indicted petitioner were employees of the United States Government (R. 5). On September 16, 1958, the petitioner moved to dismiss the indictment on the ground, among others, that the indictment was not found by a sufficient number of qualified and unbiased Grand Jurors (R. 4). Several days later a motion for a hearing on the motions of the qualifications of the Grand Jurors was filed, together with an offer of proof (R. 5-9). The motion was denied by the Court and this question was reserved for argument here.

This issue has already been presented to the Court in many cases at this Term, including *Russell* v. *United States*, No. 8, *Shelton* v. *United States*, No. 9, *Liveright* v. *United States*, No. 11, *Price* v. *United States*, No. 12, *Gojack* v. *United States*, No. 128, and perhaps others. There is little we can add to the learned and extensive discussion by counsel in the briefs submitted in those cases, and par-

ticularly in the briefs submitted in behalf of petitioners in *Russell* and *Liveright*. Since we have no desire to burden the Court with excesive duplication of material which has been presented to it in other briefs, we respectfully refer the Court to those briefs. To the best of our knowledge, the issue presented in all of those cases is identical in all substantial respects with that presented in the instant case.

POINT VI

The Committee acted in violation of the First Amendment to the Constitution and in excess of its authority.

In the *Barenblatt*, *Braden* and *Watkins* cases, to say nothing of the other cases argued at this Term of the Court, the petitioners generally have contended that there was no genuine legislative purpose to the investigation carried on by the Committee and that the Committee in general was engaged in activities which violated the First Amendment to the Constitution. This Court has on several occasions now, by closely divided vote, rejected these arguments and we shall therefore not set them forth again. We mention them here merely as a reminder to the Court that in the opinion of many this Committee constitutes a basic threat to American freedom and that it has over a period of a generation functioned in violation of the constitutional rights of those who have been called before it.

CONCLUSION

Petitioner's conviction should be reversed.

Respectfully submitted,

RABINOWITZ & BOUDIN,
25 Broad Street,
New York 4, N. Y.,

WECHSLER & DREYFUS,
504 Broadway,
Gary, Indiana.

Attorneys for Petitioner.

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
of Counsel.